



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 114 OF 2016

OKIYA OMTATAH OKOITI.....CLAIMANT

VERSUS

HEAD OF THE PUBLIC SERVICE.....1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION3RD RESPONDENT

THE HON. ATTORNEY GENERAL4TH RESPONDENT

AND

KENYA PRISON SERVICE.....1ST INTERESTED PARTY

ISAYA M. S. OSUGO.....2ND INTERESTED PARTY

OMAR TAWANE GUDAL.....3RD INTERESTED PARTY

JUDGMENT

1. The petition dated 9th August 2016, the Petitioner sought order among others that:

- a. That a declaration is hereby issued that His Excellency the President of the aforesaid Republic, does not have the mandate to direct the 3rd respondent in the performance of its duties as an independent constitutional commission.
- b. That a declaration is hereby issued that the deployment of the 3rd interested party in an acting capacity for three years as the Regional Prisons Commander in North Eastern Region is irregular and a substantive office holder should immediately be appointed according to the law.
- c. That a declaration is hereby issued that the extension of the tenures of the 2nd and 3rd interested parties beyond the mandatory retirement age of 60 years for public servants are unreasonable, unlawful, invalid illegal and therefore unconstitutional null and void ab initio.
- d. That a declaration is hereby issued that the extensions of the tenures of the 2nd and 3rd interested parties beyond the mandatory retirement age of 60 years for public servants should be quashed.
- e. That a declaration is hereby issued that the extension of the tenures of the 2nd and 3rd interested parties beyond the mandatory retirement age of 60 years for public servants is quashed.
- f. That the honourable court be pleased to issue and hereby issues an order quashing the extensions of the tenures of the 2nd and 3rd interested parties beyond the mandatory retirement age of 60 years for public servants.

g. That the honourable court be pleased to issue an order of mandamus compelling the 1st – 4th respondents to declare vacancies in the offices of the Commissioner General of Prisons and the Regional Prisons commander in North Eastern Region and commence the recruitment process of filling the vacancies in accordance with the law.

2. The petition was based on the following grounds among others:

a. The terms of the 2nd and 3rd interested party had been extended for two years beyond the mandatory retirement age of 60 years in the public service.

b. The extensions have caused anxiety especially among mid-level commanders who were angling to succeed the two.

c. The extensions were made for political reasons to woo the ethnic communities from which the two individuals hail to support the ruling coalition at the next general elections.

d. Vide a letter dated 11th May 2016 Ref. 1978041062 (237), the 2nd respondent wrote to the 1st respondent informing him that though the 2nd respondent was due for mandatory retirement upon turning 60 years, he had intervened with the President who authorized that the 2nd interested party be given an extension of service.

e. Vide a letter dated 30th June, 2016 Ref: 1978041062(240), the 2nd respondent's principal Secretary informed the 2nd interested party that though he was due for mandatory retirement on 1st August, 2016, his service had been extended by a further two years on Local Arrangement Terms.

f. Vide a letter dated 15th June, 2016 Ref: PF/1974030899/41, the 2nd interested party informed the 2nd respondent's Principal Secretary that though the 3rd interested party was due for mandatory on 1st July 2016, upon attaining 60 years, the office of the 2nd interested party had "no objection if the officer's three years request for extension of service is approved".

g. Vide a letter dated 30th June 2016 Ref: SDC/CONF/HRM1/28 Vol.XIV(159), the 2nd respondent's Principal Secretary forwarded to the 2nd interested party a letter dated 29th June 2016 Ref PSC/1/PRI/6(4) addressed to the Principal Secretary of the 2nd respondent by the 3rd respondent's secretary/CEO, approving the appointment of the 3rd interested party "on Local agreement Terms for a period of Two (2) years (Non-renewable) w.e.f. 1.7.2016 upon attainment of the mandatory retirement age".

h. The petitioner posits that there is no questioning the fact that the 2nd and 3rd interested parties are pensioners who have irregularly been re-employed in the Kenya Prisons Service contrary to both the constitution and statute.

i. The mandatory retirement age is the age at which an employee must retire by law. It is usually set out in the contract of employment.

j. Whereas there is no constitutional or statutory retirement age of public servants in Kenya, there is a clear government policy (ie a statutory instrument) on the mandatory retirement age in the public service.

k. Vide a circular Ref. No. OP.CBA.2/7A, dated 20th March 2009 and titled "Review of the Mandatory Retirement Age for Public Servants" the Government raised the mandatory retirement age for public servants from 55 years to 60 years.

l. The universal application of the mandatory retirement age in the public service is required for purposes of complying with the provisions of the constitution in Articles 10 and 259(1) on the rule of law and good governance; article 27 on equality and freedom from discrimination; Article 41(1) which proclaims that every person has the right to fair labour practices; Article 47 on fair administrative action; Article 73 as read with section 52 of the Leadership and Integrity Act 2012, on responsibilities of leadership; and Article 232 on the values and principles of public service.

m. The petitioner posits that since there is no provision in law for the retention of public servants beyond their retirement ages, it is mandatory for public servants like the 2nd and 3rd interested parties to retire upon attaining the age of 60 years.

n. Extending the employment of the 2nd and 3rd interested parties beyond their 60th birthdays under regulation E. 19 of the Public Service Code of Regulations (Revised 2006), which provides for appointment on Local Agreement Terms, as the respondents have purported to do, is a nullity in law since that statutory instrument is applicable only **"where vacancies cannot be filled on pensionable terms because of non-availability of suitable persons or where vacancies exist in the non-pensionable establishment such as in development projects...."**

o. The irregular re-employment of the 2nd and 3rd interested parties can also not be cured by Regulation E. 13 which provides for the employment of pensioners. The following exceptional circumstances, which would allow the two pensioners to be re-employed on local agreement terms of service do not exist.

3. The petition was opposed by the 2nd respondent and 2nd interested party who filed affidavits in response. In her replying affidavit Ms Alice Otwala who described herself as the Secretary/CEO of the 3rd respondent deposed in the main as follows:

- a. That the 3rd respondent's approval of appointment on local agreement terms of the 2nd and 3rd interested parties upon their retirement is well within the provisions of regulations E-13 and E-19 of the public service code of regulations, 2006.
- b. That the services of both the 2nd and 3rd interested parties are critical as well as essential for the following reasons:
 - c. That specifically, the 2nd interested party was appointed from outside the prisons service on the reform platform to spearhead the transformation of the service based on the on-going reform initiative in the service based on the report of the Madoka Commission.
 - d. That the implementation of the prisons reforms is at a critical state and releasing the commissioner at the time he retired would have derailed and even compromised the reform process.
 - e. That the 2nd interested party is currently overseeing the re-structuring and revamping of the prisons service in line with the reform strategy, hence a change of command would jeopardize the reorganization process where continuity is key.
 - f. That the appointment of the 2nd interested party on local agreement terms did not at all block advancement of other serving officers or in any way occasion discrimination as he is at job group 'U'/PG 16 while the next tier of officers are at PG 14/Job Group 'S' and PG 13/Job Group 'R'. the appointments did not thus contravene Article 27 of the constitution as alleged or at all.
 - g. That in light of the succession gaps, the role of the 2nd Interested party is essential the succession gap at PG 15/JG 'T' which is currently being addressed through a recruitment process that has just commenced.
 - h. That the commencement of the recruitment process is intended to create an exit plan upon the expiry of contract of the 2nd interested party, in a bid to address the succession gaps subsisting at the retirement of the current incumbent.
 - i. That upon completion of the said recruitment process, coaching and mentorship by the incumbent would be critical for smooth succession and transition and hence the need for the 2nd interested party to serve to the end of his contract term.
 - j. That the country is in the middle of an election cycle and hence the need for stability within the security agencies such as the prisons, prior to during and after the elections scheduled for August, 2017.
 - k. That the appointment on local agreement terms of the 3rd interested party upon his retirement, was premised on the fact that he commands sensitive prisons installations as the regional commander for the North Eastern Region.
 - l. That he has served in the said region for three years and has ably handled the challenges posed by terrorism hence the need to have him continue serving for the two years of his contract pending the sourcing and training of his replacement.
 - m. That the appointments subject of this petition were made upon careful consideration of all constitutional and other legal requirements and was at no time intended at circumventing the said laws. The allegations of violations of Article 41, 47 and 73 of the constitution, have no bearing on the appointments and are thus misplaced and untrue.
 - n. That the provisions of Articles 249 of the constitution were not violated as alleged, as the actions of the 3rd respondent are within its constitutional mandate and the provisions of the prisons Act and informed by the need for co-operation between government agencies.
 - o. That it is the position of the 3rd respondent that the approval for granting of contracts to the 2nd and 3rd interested parties was procedural, regular, within the law and with the consideration of the utmost public interest.
 - p. That the appointment of the 2nd and 3rd interested parties did not contravene Article 10 of the constitution as the code of regulation, 2006 in force at the time of the said appointments, allowed the appointment of pensioners and it supersedes the directive in circular Ref. No OP.CBA.2/7A of 2009.

4. The 2nd interested party on his part deposed among others that;

- a. I am on contract on Local Agreement Terms, which is a contract of employment for 2 years and NOT an extension of my former employment in the Kenya Prison Service.
- b. The petitioner has alleged that the 1st – 4th respondents allegedly “irregularly” extended my tenure “beyond the mandatory retirement age for public servants” without disclosing that Local Agreement Terms are lawfully engaged across the Public Service as indeed happened with my case;
- c. Local Agreement Terms authorize the 3rd respondent public service commission to retain such of its retiring employees on a lawful basis which the petitioner totally ignored to reference.
- d. The petitioner totally misapprehended Government policy on retirement at age 60, where exceptions are made to engage productive individuals beyond the age of 60 on Local Agreement Terms on contract. The petitioner thereby created (in ground b) of his motion the impression that there was blatant violation of the law by having the Local Agreement Terms under which I am on a 2

year contract with the Kenya Prisons Service.

e. His Excellency has not directed my appointment at all as alleged in Ground e) of the Motion as there is NO proof produced by the petitioner to demonstrate the alleged "direction"

f. At any rate, the petitioner's evidence relied on is a violation of Article 50(4) of the constitution as it constitutes confidential material whose source is NOT disclosed at all and whose effect is to render the trial unfair to the 2nd interested party.

g. The alleged violation of the principles of good governance, integrity, transparency and accountability were not violated at all as there was no extension of my employment as purported in ground fii of the petitioner's motion. Again I reiterate that the Petitioner has wholly misconceived my employment contract and portrayed it as an extension which it certainly is not.

h. Additionally, the petitioner has not named a single person whose "legitimate expectations" have been violated or otherwise breached as alleged. There can be no alleged violation of Article 27 in a vacuum by the making of these wide and sweeping allegations which constitute the alleged violation of Article 27 of the Constitution.

i. Pursuant to section 3(3) of the said Prisons Act Cap 90 I am aware that the service consists of such ranks of senior and subordinate prison officers as the Minister charge may, by notice in the Gazette, specify and prison officers shall have seniority as so specified.

j. The highest rank is Commissioner General of Prisons, followed as follows:-

i. Deputy commissioner General of Prisons

ii. Assistant Commissioner of Prisons (Directors of various Directorate – 8 in number)

iii. Senior Assistant Commissioner of Prisons (several)

iv. Assistant Commissioner of prisons

v. Senior Superintendent of Prisons

vi. Superintendent

vii. Gazetted officers as promoted by PSC

viii. The others are promoted by the Commissioner

k. From the foregoing, it is clear that seniority is a matter of statutory provision under the said Act. Having carefully read the petition and replying affidavit of the petitioner, nowhere has he shown that there is any person in the rank of seniority so established in the Prison department who's rights have allegedly been violated in a discriminatory manner.

l. As I recall, there had been a prisons crisis in 2008. After this (protesting that police officers' salaries had been increased by Kshs 5,000/= and other ancillary issues, but the prisons officers when left out and a strike took place).

m. I am aware that as a consequence, prison officers went on strike and during this tumultuous period, the Hon. Kalonzo (then Minister for Home Affairs) appointed a committee chaired by Rtd Hon Madsen Madoka.

n. One of the recommendations therein which I refer to was that "there should be an immediate change of top leadership in the Kenya Prisons Service. The fresh leadership should preferably be sourced from outside and predicted on a new management structure".

o. I was thus appointed from the CID and I have institutional memory over these matters and indeed I have implemented a substantial aspect of this report. The petitioner has not made this contextual bases of my being in the Kenya Prisons Force.

p. For instance, I implemented the promotion of officers, improved the general welfare of prison officers, assisted in the appointment of professionals in the Kenya Prisons, such as doctors, lawyers, engineers, nurses and so on.

q. The petitioner as I note, has not faulted my professional competence in the least. He has not cited a single instance of unprofessionalism that I can be accused of.

5. The petitioner did not file any submissions in support of the petition however his several affidavits in support of both the interlocutory application and the main petition outlined above contained useful legal and factual positions which can effectively pass for submissions.

6. Miss Mbilo for the respondents and 1st interested party submitted that there was no constitutional or statutorily set mandatory retirement age within the public service or even whether a person serving on contract can be subjected to retirement rule. According to counsel regulation of retirement age has been done through regulations supplemented by policy prescription in form of circular and service codes of

conduct.

7. Ms Mbilo further submitted that under regulation E13, the government could re-employ its own pensioner or those of other administration on temporary terms of service in exceptional circumstances which includes; the post to be filled is critical, the only suitable candidate available to fill it is the pensioner and that it is essential to secure his or her services.

8. Counsel further submitted that pursuant to Regulation 19, the government vide circular Ref No. OP.CBA. 2/7A dated 20th March 2009 titled Review of mandatory Retirement Age for Public Servants raised retirement age for all public servants from 55 years to 60 years with effect from 1st April, 2009 with exception of Judges, Academic staff, research scientists and public servants with disabilities. According to counsel, the policy document is the reference material for matters governing code of conduct of public servants including the retirement age unless expressly denoted otherwise by the constitution or an Act of Parliament. Regulation B8 expressly specifies two categories of employment within public service as pensionable and contract.

9. According to Ms Mbilo regulation B20 allows for appointment of public servants on contract terms. These appointments are based on specific legitimate reasons such as skill and productivity requirement that cannot be readily available within the realm of public servants under pensionable terms. In order to appreciate the appointment on contract of the 2nd and 3rd interested party, Ms Mbilo submitted that it was necessary to understand how they got into office.

10. According to counsel in 2008 there was prison strike as a result a special committee was formed chaired by retired Major Madoka. After thorough investigation the committee recommended among others that for reforms to be realized there should be immediate change of leadership in the Kenya Prison Service. It was further recommended that the fresh leadership should preferably be sourced from outside and predicated on a new management structure to enhance reforms in the sector.

11. This led to the appointment of the 2nd interested Party as Commissioner General. His appointment was to transform the prisons and the implementation of the reforms were at a critical stage hence it was necessary to appoint him on contract after attaining the retirement age as he was a suitable candidate as per the Madoka report.

12. Concerning the 3rd interested party the appointment after retirement was premised on the fact that he commanded sensitive prison installations as the regional commander for North Eastern Region. He served in the region for three years and had ably handled the challenge posed by terrorism hence the need to have him continue serving for the two years of his contract pending the sourcing and training of his replacement. According to counsel therefore it was clear that 2nd and 3rd interested party fell within the ambit of the exceptions provided by the regulations. In support of the submissions, counsel relied on the case of **KRA Vs Manginya Salim Murgani [2009] eKLR**.

13. Concerning infringement or threatened infringement of the petitioners constitutional rights, Ms Mbilo submitted that no provision of the constitution has been violated as a result of the appointment of the 2nd and 3rd interested party. According to counsel, the petitioner has failed to show how the articles of the constitution were violated and hence his allegation were misguided and born out of misapprehension of the facts and applicable law. Counsel submitted that the petition did not meet the threshold of pleading a justifiable cause or controversy as was held in the **Anarita Karimi's** case.

14. Regarding the documents relied on, counsel submitted that the petitioner relied on privileged public documents which he obtained without authority. The letters relied on, though public documents were privileged communication and could only be accessed with authority. According to counsel, the petitioner did not request for this information from the Government and had no evidence that he lawfully obtained the same. These documents were therefore obtained contrary to article 35 of the constitution and section 80 of the Evidence Act. To support this argument counsel relied on the case of **Nairobi Law Monthly & Another Vs Kengen [2013] eKLR**.

15. Regarding appropriateness of the petition as a way of commencing the proceedings counsel submitted that the petitioners case concerned judicial review because he was challenging the process through which the 2nd and 3rd interested party were appointed into office. The determination of the irregularity or otherwise of an administrative decision is squarely the preserve of the Judicial review court or by this court but by invoking the right rules of procedure. According to counsel the petitioner was using the constitution as a general substitute to invoke judicial control of administrative action.

16. Article 232 of the Constitution provides for values and principles of public service. These are among others:

232 (1) The values and principles of public service include;

- a. High standards of professional ethics;*
- b. Efficient, effective and economic use of resources;*
- c. Responsive, prompt, effective, impartial and equitable provision of services;*
- d. Involvement of the people in the process of policy making;*
- e. Accountability for administrative acts;*
- f. Transparency and provision to the public of timely, accurate information;*

- g. Subject to paragraph (h) and (i), fair competition and merit as the basis of appointments and promotions;*
 - h. Representations of Kenya diverse communities ; and*
 - i. Affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of –*
 - i. Men and women*
 - ii. The members of all ethnic groups; and*
 - iii. Persons with disabilities*
- (2) The values and principles of public service apply to public service in –*
- a. All state organs in both levels of government; and*
 - b. All state corporations*

17. These principles are intended to engender equity, transparency and professionalism in public service. The mischief prior to introduction of these principles in the constitution was that public service appointments were opaque and most times used to reward political cronies or divert political competition. Public service is the largest employer in the country and certain positions are created and or filled to achieve certain policy outcomes of the Government. For instance the ethnic diversity of our country is required to play a role while making appointments to public service in order to realize our national values as contained under article 10 of the constitution.

18. In this context, appointments to public service offices do not have to strictly adhere to the principle of the best candidate takes the job. On the other hand the government as an employer must subject to the constitution and statute be given the discretion to manage and control its human resource function in order to achieve policies and strategies of the Government in power in realization of what the political party in power might have pledged in its campaign manifesto. To achieve these strategies the Government of the day may hire or retain where necessary some of the most experienced persons in the relevant field regardless of whether they are past retirement age.

19. The current state of affairs in the country is that there is no statute that prescribes the retirement age. The matter is left to a policy document which has since attained the status of a binding law. This practice has worked well and I cannot recall any public servant who has refused to be retired upon attainment of the mandatory retirement age which is currently subject certain exceptions set at 60 years. The petitioner seem to have an issue with the appointment of the 2nd and 3rd interested party on Local Service Agreement for two years after they had attained retirement age. Counsel for the Attorney General has however ably demonstrated that such appointment is provided for under the PSC code of regulations more specifically clause B20 which provide;

B20 appointment on contract terms will be made under the following circumstances:

- (i) Where persons to be appointed may not qualify for pension as per the respective pension scheme*
- (ii) Where officers are appointed to serve on fixed term projects*
- (iii) Appointments at senior levels as determined by the Public Service Commission from time to time*
- (iv) Where capacity in the public service is lacking or specific skills are required.*
- (v) Personal staff of specified state officers as determined by the commission from time to time.*

20. The respondent through the Attorney General has given reasons why the 2nd and 3rd interested party were appointed for extra two years despite the fact that they had retired at 60 years. As observed earlier in this judgement the Government like any other employer should subject to rules of natural justice and the constitution be granted the managerial discretion to deal with its human resource function. Except in cases where there is violation of the constitution and statute the court would be reluctant to interrogate the veracity of the reasons given for appointment if ex facie they appear justifiable and reasonable.

21. The court however appreciates the watchdog role played by the petitioner by bringing the issue of the 2nd and 3rd Interested parties, appointment on local service agreement to the attention of the court for adjudication. The principles of Public Service contained under article 232 of the constitution must be jealously guarded if the full impact of our progressive constitution is to be realized. The petitioner's concern that appointment of persons who have attained the retirement age on local service agreement is genuine and must be commended. This window is vulnerable to abuse and could be used to reward loyalties or keep cronies in public service at the expense of equally qualified individuals.

22. The state of the law is a cause to worry about but until this policy is changed or regulated by appropriate legislation the court cannot interfere unless such appointment on the face of it smacks of bad faith and influenced by ulterior considerations which if allowed would offend the principles of public service contained under article 232 of the constitution.

23. In conclusion the court finds and holds that the appointment of the 2nd and 3rd respondent on a two year local service agreement was

lawful and for justifiable reasons. The court however would frown upon a further extension of the contract upon its expiry. Its hoped that the 2nd and 3rd respondent will use the two years to manage their succession for continuity.

24. The petition is therefore found without merit and is hereby dismissed with no order as to costs.

Dated at Nairobi this 16th day of February, 2018

Abuodha Jorum Nelson

Judge

Delivered this 16th day of February, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.